ATTORNEY FOR APPELLANT:

MONTY B. ARVIN
Kokomo, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

KENNETH WAGENER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-0602-CR-136
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Judge
Cause No. 34D01-0409-MR-316

October 17, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Kenneth Wagener appeals his conviction for murder, a felony.[1] Wagener raises two issues, which we revise and restate as:

I. Whether the evidence is sufficient to sustain Wagener's conviction for murder;

II. Whether the trial court abused its discretion in sentencing Wagener; and

III. Whether Wagener's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. On September 18, 2004, Dean Miller rode his bicycle to Kenneth Wagener's home. Miller's wife, who is also Wagener's step-daughter, arrived at Wagener's residence, and the three ate pizza, drank beer, and talked. Wagener and Miller began to argue and Wagener got up from his chair and stood over Miller, who was sitting on the couch. When Miller stood up, Wagener attempted to push him back down, and the two began to wrestle. Wagener and Miller fell on the floor, rolled around, and ended up in the kitchen. Miller pinned Wagener to the floor until Miller's wife separated them and Miller went to the living room to calm down while his wife spoke to Wagener. Wagener's glasses were broken in the tussle. Wagener went into his bedroom as Miller and his wife prepared to leave Wagener's home. As Miller and his wife were headed out the front door, Wagener came out of his bedroom with a gun and told them that they were not leaving. When Miller's wife insisted that they were leaving, Wagener fired a shot into the ceiling. The Millers continued out of the house and down the

[1] Ind. Code § 35-42-1-1 (2004).

sidewalk to the street. Wagener came out of the house and stood on the porch. When Miller reached the corner of Wagener's property, Wagener shot Miller in the back. Miller died from the gunshot wound.

Miller's wife attempted to reenter Wagener's house to call 911, but Wagener locked the storm door, requiring Miller's wife to break the door glass, reach in, and unlock the door to enter in order to get the telephone. While Miller's wife called 911, Wagener, still holding the gun, came out of his house, walked to where Miller lay and said, "mother-fucker, I told you not to mess with me." Transcript at 21-22. Wagener then turned around and walked back into his house.

Police arrived at the scene and arrested Wagener. The State charged Wagener with murder, a felony, and voluntary manslaughter, a class A felony.[2] A jury found Wagener guilty of murder. After finding no aggravating or mitigating circumstances, the trial court sentenced Wagener to the presumptive term of fifty-five years, all of which was ordered executed.

I.

The first issue is whether the evidence is sufficient to sustain Wagener's conviction for murder. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the

[2] Ind. Code § 35-42-1-3 (a) (2004).

conviction if there exists evidence of probative value from which a reasonable trier of fact could find Wagener guilty beyond a reasonable doubt. Id. In order for a trier of fact to find Wagener guilty of murder, "the State must prove beyond a reasonable doubt that [Wagener] knowingly or intentionally killed another human being." Young v. State, 761 N.E.2d 387, 388 (Ind. 2002).

Wagener argues that there is insufficient evidence to show that he intended to kill Miller. Instead, he states that he "only intended to shoot [Miller] in the leg." Appellant's Brief at 5. Further, Wagener argues that without his glasses "it is highly improbable that he aimed right at [Miller's] chest area on purpose to make a shot that would likely kill him." Id. This argument is unpersuasive. "The intent to kill may be inferred from the deliberate use of a deadly weapon in a manner likely to cause death or serious injury." Bethel v. State, 730 N.E.2d 1242, 1245 (Ind. 2000). The Indiana Supreme Court has found that a weapon fired in the direction of the victim is "substantial evidence from which a jury may infer intent to kill." Shelton v. State, 602 N.E.2d 1017, 1022 (Ind. 1992). Here, Wagner admittedly pointed the gun at Miller and shot him in the back. Wagener then stood over Miller's dead body and said "mother-fucker, I told you not to mess with me." Transcript at 21-22. Based on the evidence, a reasonable trier of fact could infer that Wagener intended to kill Miller. See, e.g., Id. (holding that evidence that defendant pointed handgun at victim and shot him twice from distances of twelve and thirty feet was sufficient to prove intent to kill).

II.

The next issue is whether the trial court abused its discretion in sentencing Wagener. Wagener argues that the trial court abused its discretion in sentencing him to the presumptive term. Sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion.[3] Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998). In this argument, Wagener claims that the trial court failed to identify all significant mitigating factors, including Wagener's work record, the unlikelihood that the circumstances would reoccur, and mitigators relevant to the death penalty case. "We give great deference to a court's determination of the proper weight to assign to aggravating and mitigating circumstances, and the appropriateness of a sentence, which is in the court's discretion." Losch v. State, 834 N.E.2d 1012, 1014 (Ind. 2005). "We will set aside a court's weighing only upon the showing of a manifest abuse of discretion." Id. Based on the record, we cannot say that the trial court abused its discretion.

At the sentencing hearing, the trial court, in applying the factors listed in I.C. 35-38-1-7.1, determined that there were no aggravating or mitigating circumstances. "A sentencing court must consider all evidence of mitigating circumstances submitted by the

---

[3] Though not raised as an issue by the parties, we note that Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. See Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3. Wagener committed his offenses prior to the effective date and was sentenced on December 8, 2005. Neither party argues that the amended sentencing statutes should be applied. Consequently, we will apply the version of the sentencing statutes in effect at the time Wagener committed his offense. Moreover, the application of the amended sentencing statute would not change the result here.

defendant; however, whether to find a mitigator within that evidence is within the court's discretion." Rose v. State, 810 N.E.2d 361, 365 (Ind. Ct. App. 2004). The Indiana Supreme Court has held:

> If the evidence in support of the mitigator is "highly disputable in nature, weight, or significance" then the trial court does not err by declining to find that mitigator." If the court completely ignores "mitigating circumstances clearly supported by the record," we may infer that the trial court improperly overlooked them. Nevertheless, "the court is obligated neither to credit mitigating circumstances in the same manner as would the defendant, nor to explain why he or she has chosen not to find mitigating circumstances."

Id. (internal citations omitted). We review the evidence supporting each proposed mitigator to determine whether the trial court abused its discretion by declining to find the mitigators proposed by Wagener.

The trial court considered Wagener's proposal regarding the mitigating factors contained in the death penalty statute, found that they were inapplicable, and stated: "Those are the factors that would have to be applied if this were a capital case in trying to make the decision as to whether or not to execute you for the commission of this crime or to consider whether or not to impose life without parole." Transcript at 402. This is not a capital case. Therefore, we cannot say that the trial abused its discretion in not considering the mitigators listed in the death penalty statute.

Wagener also contends that his "work record clearly is a significant mitigating factor." Appellant's Brief at 7. In addition, Wagener argues "there was testimony and evidence that the crime was a result of circumstances unlikely to occur, that [Wagener] would respond affirmatively to short term incarceration, and his character and attitude

indicated that he is unlikely to commit another crime." Id. The trial court determined that these were not mitigators under the statute. Wagener argues that the fact that he held a job for twenty-eight years and was a good worker is a significant mitigator. The trial court disagreed and the record does not reflect specific evidence that would require such a conclusion. Transcript at 402. See, e.g., Bennett v. State, 787 N.E.2d 938, 948 (Ind. Ct. App. 2003) (holding that the trial court properly did not find that defendant's employment was a significant mitigating circumstance where defendant did not present a specific work history, performance reviews, or attendance records), trans. denied. The trial court also did not find Wagener's argument that the crime was unlikely to recur to be a significant mitigator. Wagener proffered no evidence of this assertion other than to state that he "would respond affirmatively to short term incarceration," and that "his character and attitude indicated that he is unlikely to commit another crime." Appellant's Brief at 7. See, e.g., Henderson v. State, 769 N.E.2d 172, 179 (Ind. 2002) (finding no error in the rejection of the defendant's proposed mitigator that the crime was a result of circumstances unlikely to recur). The trial court did not abuse its discretion. See, e.g., Laux v. State, 821 N.E.2d 816, 821 (Ind. 2005) (holding that the court was under no obligation to assign a particular weight to any factor and that it is in the court's discretion to decide what weight to assign any mitigators).

III.

Wagener further argues that the presumptive sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration

of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The nature of Wagener's offense and his character do not lead us to believe that his sentence is inappropriate. Our review of the nature of the offense reveals that Wagener followed Miller, who was leaving and was no longer a threat to Wagener, and shot him in the back, killing him. Wagener went into his bedroom and retrieved his gun after the fight was over. He then proceeded to shoot an unarmed Miller in the back as he retreated, doing so in the presence of Miller's wife who was also Wagener's step-daughter. Further, Wagener, while still holding the gun, walked off his porch and over to Miller's body and said "mother-fucker, I told you not to mess with me." Transcript at 21-22. Wagener then attempted to prevent Miller's wife from calling 911 by locking the storm door. Our review of the character of the offender reveals that Wagener was fifty-three years old at the time of the crime. In addition, he worked at the same place for twenty-eight years. However, the fact that he shot Miller in the back and refused to let his step-daughter into the house to call 911 also reveals his character.

After due consideration of the trial court's sentence, we conclude that Wagener's presumptive sentence is not inappropriate.

For the foregoing reasons, we affirm Wagener's conviction and sentence for murder.

Affirmed.

KIRSCH, C. J. and MATHIAS, J. concur